SBM STATE BAR OF MICHIGAN

p 517-346-6300
p 800-968-1442
f 517-482-6248
www.michbar.org

306 Townsend Street
Michael Franck Building
Lansing, MI
48933-2012

April 1, 2011

Corbin Davis
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2008-18 – Proposed Amendment of Rule 3.501 of the Michigan Court Rules

Dear Clerk Davis:

At its March 29, 2011 meeting, the Executive Committee of the State Bar of Michigan considered the above rule amendment published for comment. The Executive Committee voted to support Alternative A but respectfully offers a revised version of proposed MCR 3.501(B)(1)(c). The proposed change can be seen by the strikethrough and bolded text below:

> (c) A party may file a supplemental motion for certification of a class if the circumstances surrounding the initial motion for certification have substantially changed following the filing of the initial motion. A supplemental motion must be filed within ~~21 days~~ **a reasonable time** ~~from of~~ the date when the party knew or should have known of the changed circumstances.

The recommended change was adopted after reviewing a letter from State Bar member, Mr. Andrew J. Morganti (letter enclosed).

We thank the Court for its publication of the proposed amendment. Please contact me with any further questions.

Sincerely,

Janet Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
W. Anthony Jenkins, President
Andrew J. Morganti

March 18, 2011

Hon. Robert P. Young, Jr., Chief Justice
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2008-18, proposed amendment to Rule 3.501 of the Michigan Court Rules.

Dear Chief Justice Young:

I am submitting this comment in response to 2008-18, the proposed amendment to Rule 3.501 of the Michigan Court Rules.

I hold a license to practice law in Michigan, District of Columbia, and Ontario, Canada. Since 1999, I have engaged in the full-time practice of class action litigation on behalf of consumers and small businesses. My current practice focuses on cross-border class actions. I reside in Northville, MI. I am currently serving as the chair of the State Bar of Michigan Antitrust, Franchising, and Trade Regulation Section and one of the vice-chairs of the American Bar Association Class Action and Derivative Suit Subcommittee. My comments are my own and do not necessarily reflect the views of any firm or organization with which I am affiliated.

First, I recommend that Michigan commission a report of the filing, administration, and resolution of class actions supported by transparent fact-finding by interviewing Michigan lawyers that practice class actions.[1]

Second, proposed Alternative B could have enormous, and most likely unforeseen and unfair consequences in its administration and application. More often than not, there is a learning curve that evolves with discovery, motion practice, regulatory intervention, and proffers made during negotiations. Limiting plaintiffs to "one and only one" motion for class certification would materially hinder the lawyers' ability to protect the best interests of their clients and absent class members. Michigan's unique ninety-one day requirement already imposes a significant obstacle to developing a class certification strategy, since only preliminary discovery, if any, will be available.[2] A blanket rule limiting plaintiffs to

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[1] *See, for example*, U.S. General Account Office (GAO) Reports GAO-07-707, SPOT CHEESE MARKET, Market Oversight Has Increased, but Concerns Remain about Potential Manipulation (June 2007), and, GAO-10-948-T, FOR-PROFIT COLLEGES, Undercover Testing Finds Colleges Encourage Fraud and Engaged in Deceptive and Questionable Marketing Practices (August 2010).

[2] *See, e.g., A & M Supply Co. v. Microsoft Corp.*, 252 Mich App 580, 639-640 (2002) (upholding the denial of class certification: "[T]he early stage of the proceedings likely did not allow Dr. Leffler [plaintiff's economics expert] sufficient data to perform--or even describe in any great detail--a regression analysis or results. However, the timing of a motion for class action certification within

"one and only one" motion for class certification will unduly hinder the trial judge's and plaintiff's lawyers' ability to modify the scope of a representative action in response to discovery, litigation developments or subsequent court rulings that demonstrate the propriety of certifying a narrowed, expanded or otherwise modified class definition.[3] Neither the parties nor the trial judge can predict these developments at the outset of the litigation. A court rule that arbitrarily prohibits the trial judge from even considering what would otherwise be a well-taken request for class certification goes too far[4] and undermines the very purpose for having representative actions in the first place.[5]

Third, I would not oppose Alternative A, allowing for a supplemental motion(s) for certification of a class if the circumstances surrounding the initial motion have substantially changed, if clarification is added to subsection (1)(c). In practical application, it is difficult to justify a requirement that a supplemental motion must be filed within 21 days of the date when a party knew or should have known of the changed circumstances. The changed circumstances that may justify a renewed or modified request for class certification may not be a single, bright-line event that manifests itself on a date certain. The changed circumstances could be the cumulative result of written discovery, deposition testimony, expert analysis, litigation developments and rulings from the trial judge and higher courts. My concerns are underscored by the language in subsection (1)(d). In practice, class action defendants could unfairly exploit MCR 3.501(B)(2) by merely dumping voluminous amounts of e-discovery on the plaintiff lawyers, which would require weeks, if not months, to upload to a server and analyze.

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the first ninety-one days after the complaint is filed is entirely a matter that rests in the plaintiff's hands.").

[3] *Cf In re Domestic Air Trans. Antitrust Litig.*, 137 FRD 677, 683 n5 (ND Ga 1991) ("The act of refining a class definition is a natural outcome of federal class action practice. [FR Civ P] Rule 23 requires that the motion for class certification be presented to the Court at the earliest practicable date. As a result, a plaintiff's original class definition is often framed on the basis of little, if any, discovery, to be opposed by defendants who have a wealth of information concerning the industry. It is not surprising that plaintiffs have revised the class definition to reflect the progress of discovery.").

[4] Trial judges already have the tools to deal with repeated, baseless motions, be they for class certification or anything else.

[5] Class actions are designed to increase the efficiency of the legal process by aggregating claims that would otherwise require repeating "the same witnesses, exhibits and issues from trial to trial." *Jenkins v Raymark Indust. Inc.*, 782 F2d 468, 473 (5th Cir 1986). Class actions also ensure that wrongdoers who cause widespread harm – but only in small amounts as to each individual victim – compensate those individuals for their injuries. *See Amchem Prods. v Windsor*, 521 US 591, 617 (1997) ("A class action solves this problem [*i.e.*, lack of incentive to pursue small claims] by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.") (citation omitted).

I thank you in advance for your attention to this matter. Please feel free to contact me if you desire or require any clarification or further explanation of my comments.

Kind regards,

Andrew J. Morganti (P57989)

cc: Elizabeth Lyon
Director of Governmental Relations
State Bar of Michigan
Michael Franck Bldg.
306 Townsend St., Lansing, MI 48933